No. 490

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HAROLD B. WILLEY,

Supreme Court of the United States

THE P. DOUGHERTY COMPANY,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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THE P. DOUGHERTY COMPANY,
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PETITION FOR WRIT OF CERTIORARI.

The Petition of The P. Dougherty Company, respectfully shows:

Summary Statement of Matters Involved.

This is a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, to review its decision and mandate wherein by a divided Court (four to three) it directed that petitioner's libel be dismissed, thereby reversing the decision and decree of the United States District Court, for the District of Delaware, which had awarded petitioner recovery of one-half of its damages in an action in Admiralty entitled "The P. Dougherty Company against United States of America."

After the customary argument before three Judges of the Court of Appeals on June 5th, 1952, and before decision, the Court on its own motion directed re-argument before the Court en banc, on December 1st, 1952. Decision was rendered September 9th, 1953, four Judges concurring in the prevailing opinion. The Chief Judge, in a dissenting opinion, stated petitioner should recover all of its damages, in which conclusion he was joined by another Judge who

wrote a supporting dissent. The third dissenting Judge wrote that the District Court's decree dividing damages should be affirmed. Petitioner's application for re-argument was denied September 30th, 1953.

The issue is whether the United States is liable under the Public Vessels Act* (46 U. S. C. 781, et seq.) for damages sustained by petitioner's barge *Harford* when the United States Coast Guard cutter *Mohawk,* while towing her, negligently struck a well known and well lighted breakwater, thereby allowing her to strike the same breakwater, in clear, calm weather, without any unusual wind or tide, after having picked up the *Harford* at sea on the request of a privately owned tug (not connected with petitioner) following the parting of that tug's hawser.

The Statutes Involved.

The suit was under the Public Vessels Act (March 3rd, 1925, C 428 Sec. 1, 43 Stat. 1112, 46 U. S. C. 781*) which authorizes suit against the United States "for damages caused by a public vessel."

As Sec. 2 of that Act provides that such suits ". . . shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title . . ." such chapter —The Suits in Admiralty Act—authorizing suits against the United States for damage caused by its merchant vessels (46 U. S. C. 741, et seq.*) must also be considered. Sec. 3 of that Act (46 U. S. C. 743*) provides in part:

> "Such suits shall proceed and shall be heard and determined according to principles of law and to rules of practice obtaining in like cases between private parties. * * *"

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* See Appendix.

The Questions Presented.

Except to the extent that the conclusions of the majority of the Court of Appeals are in conflict with decisions of this Court, as pointed out in the Chief Judge's dissenting opinion, none of the questions of law involved have been directly passed upon by this Court and as the majority opinion admits, the decision is unprecedented. The questions may be stated:

1. Is the Public Vessels Act, which permits suit against the United States for damages caused by government public vessels under circumstances which would impose liability on private vessels, to be construed so as to carve out an exception (not stated in the Act) which bars suits against the United States when the damage is caused by Coast Guard vessels, even though due to negligence of such vessels?

2. Are the rules of law and evidence in a case involving the United States Coast Guard different than those applicable in an Admiralty action involving private parties or governmental agencies other than the Coast Guard?

3. What degree of care is required of a Coast Guard vessel which continues rendering services to the "salved vessel" after all elements of danger, emergency, or unusual risk have passed, and while the Coast Guard is performing a simple, routine towage operation in bringing the "salved vessel" to a point for mooring or transfer to the custody of another vessel?

4. Is not the United States Coast Guard in the performance of its duties required to use due care measured by the exigencies of the situation and the opportunity for

the exercise of care, in other words, reasonable care in the existing circumstances?

5. Is the standard of care different when the services are being performed by a Coast Guard vessel than when a similar service is rendered by a private vessel?

The importance of the matter to the United States itself, and to the entire maritime industry of the United States, vessel owners, shippers and insurers, is at once apparent. Such importance was expressly recognized in the majority opinion of the Court of Appeals as well as tacitly by the Court's action in directing on its own motion that the case be argued again before the Court en banc.

The Opinions Below.

The District Court in an opinion reported at 97 Fed. Supp. 287 (and appearing in the record at p. 68a of petitioner's appendix), held that under numerous authorities one performing a salvage operation (if the *Mohawk's* services should fall under that classification) is liable for lack of reasonable care under the circumstances; that the *Mohawk* did not exercise reasonable care in that she failed to lay a proper course, failed to maintain proper speed and failed to increase speed or change course in sufficient time to avoid striking the breakwater, although the danger thereof was becoming increasingly apparent, and also held that improper steering of the barge contributed to the damage and granted petitioner as libelant an interlocutory decree for fifty percent of its damages.

The majority of the Court of Appeals accepted the District Court's finding of negligence on the part of the *Mohawk* which put the *Harford* in a position of danger, but (on p. 13 of the opinion) stated:

"We are of opinion that public policy dictates that the United States should not be liable for fault of the Coast Guard in the field of rescue operations."

Apparently carrying out the public policy as stated above, the majority of the Court of Appeals seemingly disregarded established rules of law under which liability would fall on towing vessels in circumstances similar to those here involved, and also disregarded the rules of law and evidence applicable in cases involving collisions between private vessels and stationary objects*. It also concluded that a private salvor is not liable for failure to exercise reasonable care, but that gross negligence or willful misconduct must be proven.

The minority of the Court of Appeals held that in view of this Court's decision in *Canadian Aviator Ltd.* v. *United States*, 324 U. S. 215, 89 L. ed. 901 (1945), the Court of Appeals was no longer free to decide whether public policy was to be considered in connection with the imposition of liability on the United States for negligent acts of public vessels. After quoting Sections 1 and 2 of the Public Vessels Act, and Section 3 of the Suits in Admiralty Act**, the chief dissenting opinion, in support of its premise that questions of public policy are no longer open under the Public Vessels Act, relied upon the following language from this Court's opinion in the *Canadian Aviator* case (*supra*)

"* * * 'Since we hold that the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel

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* *The Virginia Ehrman* v. *Curtis*, 97 U. S. 309, 24 L. Ed. 890; *The Oregon*, 158 U. S. 186, 39 L. Ed. 943; *The Gladiator*, 79 Fed. 445; *The Victor*, 153 F. 2nd 200.

** See Appendix.

in rem) as is imposed by the admiralty law on the private shipowner, it remains (only) to be considered whether petitioner states a valid cause of action under general principles of admiralty law, *in rem and in personam.*' * * *"

Following the quotation the chief dissenting opinion states:

"I conclude that under the ruling in *Canadian Aviator* both the procedural and substantive law applicable to the instant controversy must be determined by examining the principles that would govern similar litigation between private shipowners. A special rule of exemption may not be created by judicial decision for Coast Guard vessels. But the majority take the view that public policy requires that the United States should not be liable for any 'fault' or tort of the Coast Guard in the field of 'rescue' operations."

* * * * * *

"* * * I cannot bring myself to believe that Congress, implicitly and *sub silentio,* intended to relieve the United States for liability for the torts of Coast Guard vessels. In asserting the contrary proposition I cannot help but believe that the majority is substituting sentiment for the plain provisions of the Public Vessels Act. I do not decry the bravery of the Coast Guard or its usual competency but we are dealing in the instant case with an Act of Congress clearly expressing the congressional intent, and with certain specific acts of the Coast Guard in the course of its operations with the *Harford.* The conclusion seems inescapable that the United States must answer for the *Mohawk's* 'fault' or torts."

The other dissenting Judges agreed with the above stated excerpts.

Referring to the reasoning by which the majority reached the conclusion of freedom from liability on the part of the United States, the dissenting Judges concurred in the following statement in the chief minority opinion:

> "To hold the *Mohawk* not guilty of fault in navigation under the circumstances, as do the majority, seems almost incredible. Here is a towing vessel which puts *herself* as well as her tow on a breakwater and the majority say that she was not at fault. When a towing vessel casts herself on a breakwater under the circumstances at bar I am astonished that an experienced admiralty court should hold that her navigation was without blame. Finding the *Mohawk* to be without fault in herself striking the Breakwater, should not the majority, as an inherent necessary corollary, hold the *Harford* liable for the accident to the *Mohawk*? Should it not be the rule that tows, when tows and towing vessels go aground, should be held liable for the damage sustained by the towing vessels? Such would be a novel departure from existing law but is it not the rule actually set up by the majority opinion in the instant case? * * *"

All three dissenting Judges were of opinion that viewed in the light of the decisions involving private vessels (the standard set by the Public Vessels Act) the *Mohawk* was clearly guilty of negligence contributing to the damage, and two of them considered such negligence the sole cause of it. Likewise, on the authority of decisions in cases involving private parties, the minority entertained no doubt that ordinary negligence as distinguished from gross negligence or willful misconduct is sufficient to impose liability on the United States as well as on a private party rendering similar services.

Reasons for Allowance of the Writ.

1. It is self evident, we submit, that the majority decision is unprecedented in many respects. In so far as it holds that public policy dictates a certain class of government vessel shall not be liable under the Public Vessels Act it is in direct conflict with the last authoratative decisions of this Court. In so far as it applies rules of law and evidence different than those followed in private vessel cases, it is in conflict with the statute and with decisions of the Courts of Appeals for numerous other circuits.

2. The principal question, viz: whether the United States is liable under the Public Vessels Act for negligence of a Coast Guard vessel is so important to the United States itself that respondent may be well advised to join in the present petition. The same question is of general interest to owners of vessels, shippers of goods and insurers of each. It should be settled finally and authoritatively at the very first opportunity.

3. Equally important is the question whether the Public Vessels Act may be construed in such manner that the Court and not Congress may determine which class of government vessels are within and which outside of its terms. The results of over 25 years litigation to construe the Act may well be upset by this decision.

4. The entire maritime world is interested in the final and authoritative fixation of the standard of care required of a United States Coast Guard vessel.

5. It is of extreme importance to the maritime industry of the United States to obtain a final ruling whether different rules of law and evidence are to be followed in Public Vessels Act cases involving Coast Guard vessels than apply in Public Vessels Act cases involving other public vessels, or in cases between private parties.

6. The majority opinion, we submit, contains serious errors of law and its determination of the important questions above was erroneous in many respects. Such errors effect not only the parties to this litigation, but the United States and the maritime public in general.

Jurisdictional Basis.

The judgment of the Circuit Court of Appeals was entered on September 9, 1953. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), Act of June 25, 1948, c. 646, 62 Stat. 928, and petitioner proceeds pursuant to the U. S. Sup. Ct. Rule 38, 28 U. S. C. A.

Argument.

The minority opinions of the Court of Appeals in this case so convincingly demonstrate the soundness of petitioner's case, and so clearly show the reasons for granting the writ sought, that additional discussion in brief seems a needless burden upon the time of this Court. Petitioner, for it's brief, therefore, respectfully adopts and submits the dissenting opinions of the Judges of the Court of Appeals.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Counsel for Petitioner,
64 Wall Street,
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December 5, 1953.

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December 5, 1953.

Appendix.

PUBLIC VESSELS ACT

SECTION 1.

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: PROVIDED, That the cause of action arose after the 6th day of April, 1920. Mar. 3, 1925, c. 428, §1, 43 Stat. 1112, 46 U. S. C. 781.

SECTION 2.

Such suit shall be brought in the district court of the United States for the District in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest. Mar. 3, 1925, c. 428, §2, 43 Stat. 1112, 46 U. S. C. 782.

SUITS IN ADMIRALTY ACT

The following Sections are part of Chapter 20 of Title 46.

SECTION 1.

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provisions herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: PROVIDED, That this chapter shall not apply to the Panama Railroad Company. Mar. 9, 1920, c. 95, §1, 41 Stat. 525, 46 U. S. C. 741.

SECTION 2.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and

effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. Mar. 9, 1920, c. 95, §2, 41 Stat. 525, 46 U. S. C. 742.

SECTION 3.

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in Section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privatly owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation given prior to March 9, 1920, in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 748 of this title. Mar. 9, 1920, c. 95, §3, 41 Stat. 526; Ex. Ord. No. 6166, §12, June 10, 1933; June 29, 1936, c. 858, §§203, 204, 904, 49 Stat. 1987, 2016, 46 U. S. C. 743.